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IN THE

Supreme Court of the United States

No. 969

NELSON BRYANT, et al.,

Petitioners,

v.

CHARLES K. MOORE, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Identification of the parties: Throughout this petition, the parties are designated as they were in the courts below:

Petitioners: Contestors-Appellants
Respondents: Contestees-Appellees

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NELSON BRYANT, et al., *Petitioners,*

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

I. OPINIONS BELOW

There are no reported opinions below. The matter was dismissed without a trial on the merits. The Common Pleas Court of Warren County, Ohio, filed a written decision in the case which is appended hereto and denominated Appendix A.

The Ohio Supreme Court denied the Motion for Leave to Appeal and the Application for Rehearing without opinion.

II. JURISDICTIONAL STATEMENT

The Contestors-Appellants seek review of the decision of the Common Pleas Court of Warren County, Ohio, of April 9, 1963, and the subsequent entries of dismissal and entries overruling Contestors-Appellants' Motion to Vacate the Entries of Dismissal. The last Entry of the Court of

Common Pleas, the Entry overruling Contestors-Appellants' Motion to Vacate, was filed and journalized on the 12th day of June, 1963. The dates of the entries and motions intervening between April 9, 1963, and June 12, 1963, are specifically set forth in the Statement of the Case below.

Further, Contestors-Appellants seek review of the Decision of the Ohio Supreme Court refusing review of the proceedings of the court below. The form entries denying the Motion for Leave To Appeal and the Motion for Rehearing were journalized December 11, 1963, and January 22, 1964, respectively.

This appeal is being brought before the United States Supreme Court upon Writ of Certiorari by virtue of the provisions and authorities contained in Section 1257 (3) Chapter 81, Title 28 of the United States Code, which provides for institution of the appellate procedure by Writ of Certiorari in cases where the validity of a state statute is drawn into question on the grounds of its being repugnant to the Constitution or the Laws of the United States or where any right, privilege, or immunity is specifically set up or claimed under the Constitution or laws or commission held by or exercised under the United States.

III. QUESTIONS PRESENTED

1. The Question: May a state trial court summarily deny to a party his right to his day in court to contest an election, the result of which election if found to be valid would deprive said party of a privilege granted by the state to said party to engage in a lawful occupation?

The Court: The judge of the Common Pleas Court of Warren County, Ohio, held that it could deny the party his right to his day in court when the trial of the issues is not obtained within the period limited by statute.

The Appellant: Contestors-Appellants state that they did every thing within their power to secure a trial on the

issues within the time limited by statute and that the actions of the trial court and the Contestees-Appellees rendered this impossible and that the summary dismissal of the action to contest the election without a trial on the issues constitutes a deprivation of Substantive and Procedural Due Process of Law guaranteed under the Fourteenth Amendment of the Constitution of the United States of America.

2. The Question: May a state trial court abrogate the right of an aggrieved party to contest a local option election by protracting the pleading stage then dismissing the contest for failure to have a trial of the issues within the time limited by statute?

The Court: The Common Pleas court of Warren County, Ohio, journalized its Entry permitting the contestees the use of interrogatories 38 days after the expiration of time for a trial of issues as said time is limited by the statute.

The Appellant: Contestors-Appellants state that the trial courts action in dismissing the election contest for failure to secure a trial within the time limited by statute when the court itself authorized proceedings beyond said period, is unreasonable and contravenes Contestors-Appellants' right to Due Process.

3. The Question: May the court of last resort of a state judicially reduce the right of appeal granted by statute?

The Court: The Ohio Supreme Court required the Contestors-Appellants to seek review under a procedure denominated a Motion For Leave To Appeal. The court denied the motion and ignored the issue raised by Contestors-Appellants that they were appealing as of right. No reason was stated by the Ohio Supreme Court for denying the Motion or for ignoring Contestors-Appellants argument that the appeal was a matter of right.

The Appellants: The Ohio Revised Code grants to an aggrieved party in an Election Contest the right to appeal to the Ohio Supreme Court. The statutory authority to

grant said right is founded in the Constitution of the State of Ohio. The Ohio Supreme Court is without power to modify or in any way abridge said right of appeal. It is mandatory for the Ohio Supreme Court to admit Contestors-Appellants appeal and to grant them a full hearing on the merits and to do otherwise is to deny the Contestors-Appellants their full protection under the Constitution by Due Process of Law.

IV. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

A. Constitutional Provisions

1. FEDERAL

The Fourteenth Amendment of the United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. STATE

Article I, Section 16, of the Constitution of the State of Ohio:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered *without denial* or delay. (Emphasis added)

Article II, Section 21, of the Constitution of the State of Ohio:

> The general assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted.

B. Statutes of the State of Ohio

Ohio Revised Code, Section 3515.09:

Filing contest petition.

A contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the petition, and shall set forth the grounds for such contest.

Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election are confirmed or the petition is dismissed or the prosecution fails, judgment shall be rendered against the contestor for the costs; and if the judgment is against the contestee or if the results of the nomination or election are set aside, the county shall pay the costs as other election expenses are paid.

Ohio Revised Code, Section 3515.10:

Court shall fix time for trial.

The court with which a petition to contest an election is filed shall fix a suitable time for hearing such

contest; which shall be not less than fifteen nor more than thirty days after the filing of the petition. Such court shall have a copy of contestor's petition served upon the contestee or upon the chairman of the committee taking the other side in advocacy of or opposition to any issue, in the same manner as a summons in a civil action. The contestee shall have ten days from the time service has been made upon him in which to answer the petition, and the contestor shall have five days in which to reply to the answer of the contestee. All parties may be represented by counsel and the hearing shall proceed at the time fixed, unless postponed by the judge hearing the case for good cause shown by either party by affidavit or unless the judge adjourns to another time, not more than thirty days thereafter, of which adjournment the parties interested shall take notice.

Ohio Revised Code, Section 3515.11:

Trial proceedings.

The proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, with power to order or permit amendments to the petition or proceedings as to form or substance. Such court may allow adjournments for not more than thirty days, for the benefit of either party, on such terms as to costs and otherwise as seem reasonable to the court, the grounds for such adjournment being shown by affidavit. The hearing shall proceed expeditiously and the total of such adjournments shall not exceed thirty days after the date set for the original hearing.

Ohio Revised Code, Section 3515.15:

Appeal on questions of law to supreme court.

The person against whom judgment is rendered in a contest of election may appeal on questions of law, within twenty days, to the supreme court; but such

appeal shall not supersede the execution of the judgment of the court. Such appeal takes precedence over all other causes upon the calendar, and shall be set down for hearing and determination at the earliest convenient date. The laws and rules of the court governing appeals apply in the appeal of contested election cases. If the judgment of the lower court is affirmed, the supreme court shall order the judgment of such lower court to be enforced, if the party against whom the judgment is rendered is in possession of the office.

Ohio Revised Code, Section 2309.43:

Annexing interrogatories to pleadings.

A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath by the party to whom they are propounded, or if such party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires.

Ohio Revised Code, Section 2317.07:

Written interrogatories; corporation officers may be examined.

At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness, by way of written interrogatories filed in the action or proceeding pertinent to previous pleadings of such party, or by any one or more of such methods. Unless demurred to or otherwise ordered by the court, each of such written interrogatories shall be plainly and fully answered in writing under oath within thirty days. No party may, without leave of court, file more than one set of interrogatories to be answered by the same witness. If the party is a corporation, any or all of the officers thereof may be so examined at the instance of the adverse party. The party calling for such exam-

ination shall not thereby be concluded but may rebut it by evidence.

C. Rules of Court, Common Pleas Court of Warren County, Ohio

Rule 2: Assignment of Cases for Trial.

All civil cases which come to issue shall be placed by the Assignment Commissioner upon the trial calendar immediately upon the joining of the issue, or issues, between the parties, and shall come on for trial thereafter in their numerical order. For the purpose of default judgments, civil cases shall, as to the affected parties, be considered as placed upon the trial calendar immediately upon default, and shall be available for trial out of order forthwith.

The Clerk of Courts shall notify counsel in all cases set for trial, at least 30 days in advance of such setting, by mail. Cases shall be noted for trial in the official publications of the Court not less than 10 days, and not more than 30 days, before the trial date.

Rule 22: Motion Days.

Each Wednesday, beginning at 9:00 A.M. before the Court proceeds with the regular assignments, judgments by default and orders not requiring trial or argument will be entered by the Court, but for good cause shown, the Court will permit such entries to be made at any other time when it can be done without interrupting the business of the Court.

Each Wednesday beginning at 9:00 A.M. before the Court proceeds with the regular assignments, in addition to the matters set forth above, all motions and demurrers will be considered and arguments thereon heard, as provided in Rule 10.

Each Saturday morning, beginning at 9:00 A.M. before the Court proceeds with the regular assignments, temporary alimony hearings and uncontested divorce and alimony hearings shall be had, and the

Court will not permit such hearings at any other time except for good cause shown.

Rule 10: Motions and Demurrers.

Except in the case of motions for a new trial and formal motions, such as the granting of interlocutory relief, issuing of process or notices, and similar matters, there shall be filed with each motion or demurrer, a memorandum stating the grounds upon which the said motion or demurrer is based, with a citation of the authorities relied upon to sustain the same. Such memorandum shall appear upon the same document upon which appears the motion or demurrer. A copy of said motion or demurrer and memorandum shall be mailed to or served upon all opposing counsel on the day said motion or demurrer is filed. For failure to comply with this rule, such motion or demurrer shall be stricken from the files at the cost of the party filing the same.

All motions and demurrers shall be in writing, except such motions as may be made during the trial or the hearing of the cause.

All motions and demurrers shall be set down forthwith for hearing and the party or parties appearing shall be privileged to argue said motion or demurrer. The Clerk shall, for each week ending on Saturday, keep a list of the motions and demurrers filed during that week, and shall enter each motion and demurrer on said list immediately on its being filed. All such motions and demurrers shall be for hearing on the second Wednesday after such Saturday and notice of such hearing shall be published in the Western Star and the Franklin Chronicle in advance of such hearing. If the party filing said motion or demurrer fails to appear, said motion or demurrer shall be considered by the Court as if submitted upon briefs.

V. STATEMENT OF THE CASE

A local option election was held in South Lebanon, Ohio, on the 6th day of November, 1962, to determine whether

or not the electorate of the village desired to discontinue lawful trafficking in alcoholic beverages within the corporation limits. Elections of this nature are authorized by Sections 4301.32 through 4301.41, of the Ohio Revised Code.

The officially tabulated results of the voting indicated that the majority of the electorate preferred prohibition against lawful trafficking in alcoholic beverages in the Village of South Lebanon, Ohio.

The Contestors-Appellants alleged that the results were incorrect and demanded a recount. The recount did not change the result. However, the Contestors-Appellants contested the results of the election on the following grounds:

1. That certain votes were cast for prohibition by persons not having the qualifications of electors of said village, which votes were counted.

2. That certain ballots were counted at the recount as being for prohibition which ballots were not properly marked and should not have counted as being votes for prohibition.

3. That the persons favoring prohibition and who caused the election to be held did violate the Ohio Corrupt Practices Act and thereby vitiated the election result.

4. That the Local Option Laws authorizing the election are unconstitutional and the election therefore was a mere nullity.

Sufficient ballots were challenged and at issue to change the result of the election.

In support of their position the Contestors-Appellants took the following steps in proceedings below:

1. Application for Recount filed November 13, 1962, by the contestors.

2. November 14, 1962, the Warren County Board gave notice of the application for recount.

3. November 20, 1962 recount held in the presence of contestors and contestees and their counsel.

4. Petition to contest the election filed November 30, 1962, by the contestors.

5. Entry ordering service on contestees and setting the election contest for trial on December 19, 1962, filed December 3, 1962, at the behest of contestors.

6. Service of petition and entry setting election contest for trial served and returned December 5, 1962.

7. Answer with interrogatories annexed filed December 18, 1962, by contestees.

8. Demurrer to interrogatories filed December 18, 1962, by contestors.

9. Hearing date of December 19, 1962, vacated by the court and contestees.

10. Answers to interrogatories filed December 29, 1962, by contestors.

11. Reply with interrogatories attached in accordance with ruling of court and agreement of counsel for contestees, filed December 29, 1962, by contestors.

12. Motion to strike interrogatories filed January 9, 1963, by contestees.

13. Decision sustaining in part and overruling in part the contestors' demurrer to contestees' interrogatories, filed February 6, 1963, by the court.

14. Decision on contestees' motion to strike contestors' interrogatories filed February 14, 1963, by the court.

15. Interrogatories refiled February 25, 1963, by contestors.

16. Entry sustaining contestees' motion to strike contestors interrogatories of December 29, 1962, filed March 2, 1963, by the court.

17. Answer to contestors' interrogatories of February 25, 1963, filed March 14, 1963, by contestees.

18. A hearing date, for preliminary matters, set for March 20, 1963, by contestees.

19. Motion to dismiss contestors' petition for the reason that contestors had filed dilatory pleadings, filed March 20, 1963, by contestees.

20. Hearing date on motion to dismiss set for April 3, 1963, at hearing contestors moved orally for an immediate trial date.

21. Decision sustaining contestees' motion to dismiss filed April 9, 1963, by the court.

22. Entry sustaining contestees' dismissal motion filed April 25, 1963, without notice to contestors by contestees.

23. Motion to set aside the April 25th entry of dismissal filed May 13, 1963, by contestors.

24. Notice of appeal May 15, 1963, by contestors.

25. On May 22, 1963, a hearing and oral decision sustaining contestors' motion to set aside the April 25th entry of dismissal. At that time the court gave contestees permission to refile the entry of dismissal and granted contestors a hearing date for May 29, 1963, on contestors' oral motion to vacate the court's April 9th decision of dismissal.

26. Entry of dismissal filed May 22, 1963, by contestees.

27. Formal written motion to vacate the May 22nd entry of dismissal filed May 24, 1963, by contestees.

28. Hearing and oral decision on May 29, 1963, overruling contestors' motion to vacate the entry of dismissal and to set the election contest for a trial on its merits.

29. Second notice of appeal filed June 5, 1963, by contestors as the first notice of appeal May 15, 1963, was rendered premature by the later filing of the entry of dismissal on May 22, 1963.

30. Entry overruling motion to vacate filed June 12, 1963, by contestees.

31. Third notice of appeal filed June 29, 1963, as the second notice of appeal of June 5, 1963, was rendered premature by the later filing of the final entry in the matter below on June 12, 1963, by contestees.

32. Oral hearing on Motion for Leave to Appeal before the Ohio Supreme Court on December 3, 1963.

33. Entry of Ohio Supreme Court denying Motion for Leave to Appeal, December 11, 1963.

34. December 14, 1963, contestors-Appellants made application for a rehearing before the Ohio Supreme Court.

35. January 22, 1964, the Ohio Supreme Court denied the Application for Rehearing.

The Common Pleas Court of Warren County, Ohio, stated in granting to the Contestees-Appellees the right to submit written interrogatories to Contestors-Appellants that it was cognizant that the same were not authorized by the statutes governing election contests but that it was construing the statutes liberally to permit written interrogatories in the interest of an expeditious refinement of the issues. The court granted Contestors-Appellants until Friday, December 29, 1962, to file answers to interrogatories and the Contestees ten days following the filing of interrogatories by Contestors-Appellants to answer. The last day within the statutory period for a trial was Saturday, December 30, 1962.

VI. FEDERAL QUESTIONS RAISED AT FIRST OPPORTUNITY

Contestors-Appellants in their petition to contest the election alleged that the statutes authorizing said election were unconstitutional. This issue has not been passed on in the instant case as Contestors-Appellants have never been granted a trial upon the issues joined by their petition and the answer filed by Contestees-Appellees.

No violation of Contestors-Appellants rights to redress of wrongs committed against them occurred until such time as the Common Pleas Court of Warren County, Ohio, dismissed the election contest without permitting a trial of the issues. However, Contestors-Appellants orally raised the

due process issue in their argument before the Common Pleas Court in resistance to Contestees-Appellees' Motion to Dismiss.

This issue has been asserted at every subsequent stage of these proceedings. Contestors-Appellants asserted at pages seven and eight in their brief in Support of Motion For Leave to Appeal, filed in the Ohio Supreme Court, that the denial of Contestors-Appellants' right of their "day in court" was a deprivation of due process in contravention of the rights protected and guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 16, of the Ohio Constitution. Service of said brief was obtained on the 9th day of August, 1963.

In their Application for Rehearing filed December 14, 1963, Contestors-Appellants asserted at page three of said application that the Ohio Supreme Court in refusing to review the disposition of the instant case by the Common Pleas Court was compounding the deprivation of due process wrought upon the Contestors-Appellants by said Common Pleas Court.

VII. ARGUMENT FOR THE ALLOWANCE OF THIS PETITION FOR WRIT OF CERTIORARI

A. An Issue of Substance Not Previously Determined By This Court

The unique factual background of this case presents an issue under the "Due Process Clause" of the Fourteenth Amendment that has not been previously adjudicated by this Court. This matter is one that exemplifies the wisdom of this Court in declining to state a set of arbitrary standards of due process.

> This court has always declined to give a comprehensive definition of it (Due Process), and has preferred that its full meaning should be gradually ascertained

by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

Twining v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 54 L. Ed. 97 (1908)

Though many decisions have dealt with the issue of denial of due process, none can be uncovered dealing with a situation where a trial court and a state court of last resort have both denied to a party the right to be heard for a wrong inflicted, even though said right to hearing has been specifically granted by statute based upon a singular mandate of the State Constitution. Such is the situation in the instant case.

Nevertheless, this petition for certiorari is founded upon general principles of due process previously enunciated by this court and wholely applicable to the instant factual situation.

The grossness of the deprivation in this case explains the absence of analogous precedent.

B. The Decision of the Trial Court Contravenes Applicable Principles of Due Process

The Statement of the Case outlines the proceedings below in summary form. A cursory review of the Statement of the Case reveals that all the conditions and obligations placed upon the Contestors-Appellants by Sections 3515.08 through 3515.16 of the Ohio Revised Code have been met. This being true, the law of Ohio requires that a trial be held upon the issues joined. The Court found Contestors-Appellants did not have a trial within the 30-day period set by Section 3515.10 of the Ohio Revised Code and dismissed the case. The Court ignored the fact that Contestors-Appellants requested and were granted a trial date which the Court itself vacated. The Court by its own acts extended the pleading stage beyond the period provided by statute over the objection of Contestors-Appellants.

Daniel Webster in his argument in *Dartmouth College* v. *Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 689, set forth the broad outline of "law of the land" or "due process" when he said:

> By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment *only after trial*. The meaning is that every citizens shall hold his life, liberty, property, and immunities under the protection of the general rules that govern society.

The principles of Webster were adopted with approval by this court in *Hurtado* v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), and *Truax* v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

In *Hallinger* v. *Davis*, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986, this court found the concept to apply generally to the whole of the United States and that the "law of the land" exists in each state.

Due Process guaranteed by the Constitution of the United States and the Ohio Constitution is not merely a relative term; it is an absolute right for the protection of the individual. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530. Notice, opportunity to be heard, opportunity to defend, orderly proceedings adapted to the nature of the case before a tribunal of competent jurisdiction are all essential elements of due process. (Numerous cases at 12 Am. Jur. § 573.) Due process is something more. Due process is the basic concept of our system of government by law. Law embodies due process and is something more than mere will exerted as an act of power. *Hurtado* v. *California*, *supra*. It is more than a political right, it is a legal right assertable in the courts. *State* v. *Henry*, 37 N. M. 536, 25 P. 2nd 204. To assert a legal right a litigant must have a right to his "day in court." This is the very essence of due process. *Pink* v.

A.A. Hwy. Express, 1941, 191 Ga. 302, Affirmed, 314 U. S. 201, 62 S. Ct. 241, 86 L. Ed. 142. A "day in court" necessarily means the right to a full and impartial hearing before a tribunal, with an opportunity to present evidence, and argument, and to examine and rebut the evidence and arguments of the opposition. It means the right to determine the issues on their merits. *In Re American Rio Grande Land & Irrigation Co.*, D. C. Tex. 1937, 21 F. Supp. 492, Cert. Denied, 308 U. S. 573, 60 S. Ct. 88, 84 L. Ed. 481; *Snyder* v. *Mass*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674; *Ex Parte Martin*, 1942, 139 O. S. 609, 41 N. E. 2nd 702; *Lyons* v. *Goldstein*, 290 N. Y. 19; *McCollam* v. *Birmingham Post Co.*, 1953, 259 Ala. 88. "Day in court" means a fair, open, and reasonable proceeding. *Calif.* v. *Pacific Gas & Electric Co.*, Cal. 1938, 30 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319; *Cox* v. *Armour Fertilizer Co.*, Fla. 1915, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027.

The rule of one full day in court includes appeal to the court of last resort of the jurisdiction. *Aero Design & Engineering Co.* v. *Oklahoma Employment Sec. Commission*, D. C. Okla. 1956, 151 F. Supp. 844, affirmed, 353 U. S. 943, 77 S. Ct. 824, 1 L. Ed. 2nd 855.

The above enumerated principles, extracted from the cited cases and affirmed by cases too numerous to enumerate, are fundamental. Yet, these precise fundamental rules of due process were ignored in this case. In essence, the trial court applied the principle of liberal construction to the election-contest statutes and caused the protraction of the pleading stage by vacating the trial date and permitting Contestees-Appellees to interject a procedural step not specified by statute. As a result the pleading stage, as enlarged by the court, extended beyond the time directed by statute for holding a trial on the merits. Contestees-Appellees moved for dismissal for failure to try the contest within the time limited by statute. The court then applied the principle of strict construction and said it had no choice

but to dismiss because a trial was not achieved within the time limited by statute.

Contestors-Appellants do not question the adequacy of the statutory remedy for contesting elections. It meets all the minimum constitutional requirements for due process. They are denied due process because they were judicially denied the right to avail themselves of that remedy. Due process is just as effectively denied by the unjust administration of the law by the judiciary as it is by the passing of unjust laws by the legislature.

The Ohio Supreme Court compounded this deprivation of due process by abrogating Section 21 of Article I of the Ohio Constitution which granted to the legislature the power ". . . to determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted." The legislature said in concise, plain language that "The person against whom a judgment is rendered in a contest of election may appeal on questions of law . . . to the Supreme Court. . . . Such appeals shall take precedence over all other causes upon the calendar, and *shall be set down for hearing* at the earliest convenient date." Section 3515.15, *Ohio Revised Code*. Nothing in this section could be construed to grant discretion to anyone but the "person against whom judgment is rendered." Yet the Ohio Supreme Court directed that the Contestors-Appellants must seek review by filing a Motion for Leave To Appeal. Without comment and upon a printed form entry the Ohio Supreme Court, as did the Common Pleas Court of Warren County, Ohio, denied the Contestors-Appellants their "day in court."

Some of the Contestors-Appellants are holders of liquor permits and owners of taverns now doing business in the Village of South Lebanon, Ohio. The Ohio Supreme Court has held that the continuance of a business, lawful at its inception, is a right within the protection of the Fourteenth Amendment. *Akron* v. *Chapman*, 160 O. S. 382. All the

Contestors-Appellants have been denied a free and fair election and the protection guaranteed by the law of the land: Ohio to correct the errors in said election. Each of the permit holders suffers the additional loss of his business and livelihood without compensation and without due process.

VIII. CONCLUSION

The two principles most important to democracies are at issue in this case: the right to vote in a fair election and to have the vote fairly counted; and the right to redress of grievances by due process of law. Neither principle can long stand without the protection of the other. These principles separate us from the opposite poles of anarchy and totalitarianism. The deprivation of due process in this case is no less because it was wrought by the judiciary rather than the legislative or executive branch of our government.

IX. PRAYER

WHEREFORE, Contestors-Appellants pray that the judgment of the Common Pleas Court of Warren County, Ohio, be reversed and a mandate issued requiring this case be docketed forthwith for trial upon its merits.

Respectfully submitted,

SCOTT H. RAY, JR.
8 S. Broadway
Lebanon, Ohio

LOUIS C. CAPELLE
505 Walnut Street
Cincinnati, Ohio
Attorneys for Petitioners

APPENDIX

APPENDIX A.

Filed April 9, 1963

IN THE COMMON PLEAS COURT
COUNTY OF WARREN, STATE OF OHIO

Case No. 25201

NELSON BRYANT, et al.,

Plaint

v.

CHARLES K. MOORE, et al.,

Defenda

DECISION

YOUNG, J.

This matter is before the Court on the motion of contestees to dismiss the contest for the reason that same has not been heard within the time specified statute.

Both contestees and contestors cite the case of *Jenkin Hughes*, 157 O. S. 186, and in addition contestees *McCall* v. *Board of Education*, 169 O. S. 50 and *William O'Neill*, 142 O. S. 467.

The syllabi in the McCall case are both strongly fa able to contestees' position in this case. The first sylla stating that the prescribed procedure must be strictly lowed and the second indicating that where "the hea was not set in compliance with the statute, that no req for the setting of such hearing was made . . . the ju with whom the petition was filed HAS NO ALTER

TIVE but to dismiss the same, on motion of the contestee, for lack of jurisdiction and authority to proceed."

While a careful reading of the decision may raise some doubts as to whether the strong language in the second syllabus is warranted, nevertheless, that is the real import of the decision.

The decision also disposes of the question of the role and responsibility of the Court in connection with the prescribed statutory steps with this language, "but some duty devolves upon the contestor, who inaugurates the contest, to see that this is accomplished."

The file in this matter fails to indicate that the contestors have, at any time, requested that the contest be set for trial and indeed the record indicates that "interrogatories of contestors" were filed by contestors on February 25, 1963, some eighty seven (87) days after the filing of the contest.

It is therefor the decision of the Court that upon the cited authority requiring strict construction of the statutes involved that the motion of contestees must be sustained.

Counsel for contestees may prepare an entry conforming to this decision, providing for the dismissal of the action at contestors' expense and reserving their exceptions to this decision.

APPENDIX B

Filed April 25, 1963
IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

No. 25201

NELSON BRYANT, et al., *Contestors,*

v.

CHARLES K. MOORE, et al., *Contestees.*

ENTRY

This cause came on to be heard on 3 April, 1963, upon the Motion of the Contestees to dismiss this contest for the reason that the same has not been heard within the time specified by statute, the Memorandum filed with said Motion and upon arguments of counsel for both Contestors and Contestees.

Upon consideration whereof, the Court finds that said motion is well taken and that the same should be sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that this cause be, and the same is hereby, dismissed at the cost of the Contestors.

To all of which Contestors except.

Judge

FILED
1963 Apr 25 AM 8:41
C. C. BECKETT
Clerk of Courts
Warren County, Ohio
Refiled as of May 22, 1963
GEO. H. ELLIOT, *for Defts.*
SCOTT H. RAY, JR., *Atty. for Contestors*

APPROVED:

Attorney for Contestors

Attorneys for Contestees

FILED
1963 May 22 AM 9:32
C. C. BECKETT
Clerk of Courts
Warren County, Ohio

APPENDIX C

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

No. 25201

NELSON BRYANT, et al., *Contestors,*

v.

CHARLES K. MOORE, et al., *Contestees.*

ENTRY

This cause came on to be heard on 29 May, 1963, upon the Motion of the Contestors for the vacation of the Entry of Dismissal filed herein on 22 May, 1963, and for an assignment of this cause for trial on the merits, and upon the evidence and the arguments of counsel.

Upon consideration whereof, the Court, being fully advised in the premises, finds that said Motion is not well taken and that the same should be denied in its entirety.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Motion of Contestors for vacation of the previous Entry of Dismissal herein and for assignment of this cause for trial be, and the same are hereby, overruled.

To all of which Contestors except.

Judge

APPROVED:

Attorney for Contestors

Attorneys for Contestees

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To wit: Wednesday, December 11, 1963

THE STATE OF OHIO
CITY OF COLUMBUS

No. 38356

NELSON BRYANT, et al., *Appellants,*

v.

CHARLES K. MOORE, et al., *Appellees.*

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF COMMON PLEAS FOR WARREN COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Scott H. Ray, Jr.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19...
.....Clerk
.....Deputy

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

CITY OF COLUMBUS
THE STATE OF OHIO

No. 38356

NELSON BRYANT, et al., *Appellants,*

v.

CHARLES R. MOORE, et al., *Appellees.*

REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, Thomas L. Sartzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said court, to wit, from Journal No. . . . , Page . . . .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this . . . . . day of . . . . . , 19 . . . .

. . . . . Clerk.

By . . . . . Deputy.